

The CURE

Contract User's Resource for Excellence

The "CURE" is a quarterly newsletter of the State Controller's Office

Volume 9, Issue 1

February 2003

News From The SCO A State Controller's Office Update

CCIT MEETING

The February CCIT (Colorado Contract Improvement Team) meeting will be held on Wednesday, February 19th from 9:00 a.m. - 12:00 in Building 100 at Camp George West. Camp George West is located just East of Golden on Old Golden Road. The address is 15055 So. Golden Road. If you have questions about the meeting, please call a member of the Central Contract Unit. A map is located at www.sco.state.co.us/cure.cure.htm.

An agenda is included on page 8.

What's Inside this
Issue

Independent Contractor Issues related to current state employees (page 2) .

Thinking of terminating a lease? Check with the state's Real Estate experts first (page 4).

E-MAIL ADDRESS CHANGES

To make sure you do not miss an issue of the CURE or other important state contract information be sure that you keep your e-mail address current by sending changes to Kevin in the SCO CCU at:

kevin.cruise@state.co.us

Central Approvers Names and Numbers

NAME	PHONE #	FAX #
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Department of Personnel & Administration (DPA)

State Controller's Office (SCO)

Central Contract Unit:	Phone Number	Fax Number
Phil Holtmann	303-866-3809	303-866-4233
Yvonne Anderson	303-866-2862	303-866-4233

Routing, Distribution and E-mail Updates:

Kevin Cruise	303-866-2127	303-866-3569
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Statutory Violations:

John Ivy	303-866-3765	303-866-3569
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Human Resource Services (DPA/HRS)

Personal Services Review Program:

Joi Simpson	303-866-5496	303-866-2458
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State Buildings and Real Estate Programs

Carol Lieber (SBREP)	303-866-3158	303-894-7478
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Donna Barr (REP)	303-866-4564	303-866-2201
Clark Bolser (REP)	303-866-4759	303-866-2201
Bob Marshall (REP)	303-866-2204	303-866-2201

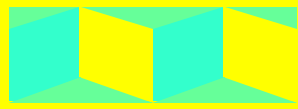
State Purchasing (SPO)

Kay Kishline	303-866-6100	303-894-7440
Monica Rahman	303-866-6155	303-894-7440

Office of the Attorney General (AGO)

Robert Bowers	303-866-5027	303-866-4139
Bea Pagette	303-866-5227	303-866-4139
Steve Smith	303-866-5142	303-866-4139

NOTE: You may e-mail any of the above by using the following format: **firstname.lastname@state.co.us**



Personal Services Update - Independent Contractor vs. Employee

***By Sue Haung, Compensation Specialist
& Joi Simpson, Personal Services Contracts Specialist***

We have received several inquiries from agencies in recent months on the issue of utilizing state employees as contractors to perform the same or similar work they perform as employees. With the current budget situation, agencies are challenged to optimize existing budgets and employees. This article is to clarify the difference between an independent contractor and an employee and outline potential legal liabilities.

Agencies looking to solve their staffing issues with temporary or contingent workers must consider the legal implications of the employer-employee relationship. Relevant factors must be examined to ensure compliance with the various state and federal laws that govern employment relationships. These factors should be reviewed from time to time to ensure that new circumstances have not altered an employment relationship.

Under federal and state laws, an independent contractor must be just that - independent. He or she must provide a product or service without punching a time clock or being directed on how to do the work.

Few current employees are likely to qualify as independent contractors. There are three key determining factors when qualifying an individual as an independent contractor.

1. Behavior control - Does the employer direct or control how the worker performs the task. Generally, someone who is told when, where and how, what tools or equipment to use, what workers to hire, where to purchase supplies, and the order in which to do the work, should not be considered an independent contractor.
2. Financial control - What is the worker's investment in the facilities he or she uses, to what extent is the worker making his or her services available to other organizations, how is the worker paid, and can the worker realize profits and losses from the services provided to the state? If one invests in the facilities, tools used and if one's service is also available to others, most likely this worker may be considered an independent contractor.
3. Nature of the relationship – Is the organization providing benefits to the worker, are taxes being withheld from the worker's pay, are employer's taxes being paid on behalf of the worker, is the relationship expected to continue indefinitely, and is the service provided by the worker essential to the regular business of the organization? If so, the worker may not be considered an independent contractor.

If an agency were to hire a current state employee (permanent or temporary) as a contractor to perform the same or similar duties, it is unlikely that the agency can certify that individual as an independent contractor. Although changing current employees to independent contractors may

Personal Services Update - Article continuation



save some costs, this change could put the state at risk for law suits, heavy fines and IRS penalties. If your agency is considering this type of arrangement, consider these options:

1. If the employee is not eligible for over time, consider offering temporary differential pay or an incentive (refer to Director's Administrative Procedures P-3-21 and P-3-49 (D)).
2. If the employee is eligible for overtime, and the employee works more than 40 hours a week due to additional assignment, pay overtime.
3. Hire workers from an independent service that is completely responsible for the workers.

Potential liabilities under the FLSA for mischaracterization are liability for unpaid overtime or minimum wage, liquidated damages, fines, and criminal sanctions. There may also be potential fines or penalties under the IRS. As a final note, when considering the utilization of contractors, be aware that converting a state employee or a state temporary employee to a personal services contract to perform the same function, would pose the same risk to the state.

If you are not sure about the independent contractor relationship, please contact your legal counsel or Joi Simpson, Personal Services Contracts Specialist, at 303.866.5496. For questions relating to FLSA, please contact Sue Huang at 303.866.4219.



**On the World Wide Web at :
www.sco.state.co.us/**

**CONTRACT PROCEDURES AND MANAGEMENT
MANUAL
contract/contractprocedures.htm**

**CURE
cure/cure.htm**

**PERSONAL SERVICES REVIEW PROGRAM
AND RELATED FORMS**

www.state.co.us/hrs/contracts/index.htm



Real Estate Programs Termination of Leases: What to do ?

By Donna Barr, Asset Manager

With the continuing budget constraints and efforts by agencies and institutions to find ways to save money and cut costs, it is important to once again clarify policies pertaining to termination of leases pursuant to the fiscal funding, federal funding or collocation clauses in the state's standard lease form.

Please remember that **state agencies and institutions must contact Real Estate Programs *prior to exercising the termination options for lack of fiscal funding, lack of federal funding, or the intention to collocate*** pursuant to the role of Real Estate Programs to negotiate and execute leases per 24-30-1303 CRS. There are a number of reasons for this.

First, we periodically distribute a space availability report letting all real estate contacts and the state brokers know about space available in state buildings or in private lease space that other state agencies may be interested in. This will often provide a lower lease rate for those agencies seeking space and also allows the state to continue the lease through to the end of the term without the necessity of exercising any of the termination options. Real Estate Programs can only include potentially available space if we are notified as far in advance as possible.

Secondly, it is preferable for state agencies and institutions to continue to the end of the lease term if possible (even through a sublease to another agency) since use of either the fiscal funding or the collocation early termination clauses may cause significant ill will within the landlord community, with whom other agencies, Real Estate Programs and the state's brokers must deal every day. If it is not possible to continue the lease, it is better to attempt to negotiate an early termination with the landlord, rather than abruptly terminate the lease and risk resulting landlord antagonism that may occur.

Thirdly, there is a very valid concern about the ability of the state in general, or certain agencies in particular, to enter into future leases if landlords believe that there is a likelihood that the lease will not continue to the end of the term.

Lastly, whether justified or not, there is a possibility of litigation by a landlord resulting from such terminations. It is recommended that you consult with the designated legal counsel for your agency or institution prior to terminating leases on the basis of the above-referenced clauses.

It is also important for agencies to realize that the lease obligates them to "take such action as is necessary under the laws applicable to Lessee to timely and properly budget for, request of and seek and pursue appropriation of funds of the Legislature of the State of Colorado which will permit Lessee to make all payments required under this lease."

In some cases there is also a "termination consideration" clause requiring the tenant agency to request a predetermined amount which is prorated over the term of the lease to reimburse the landlord for tenant finish or brokerage fees if the agency terminates the lease early for fiscal funding or collocation. Although that clause only obligates the state to "request" funding, as stated above there could be significant ill will created if no reimbursement was made.

Please feel free to contact me to discuss this issue or to pass on your comments and concerns.



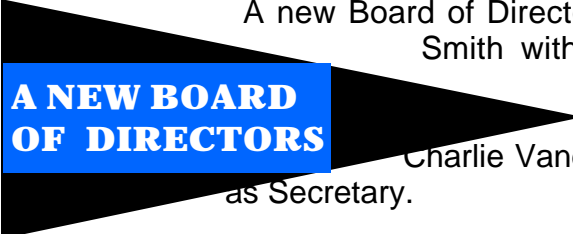
STATE CONTRACT ADVISORY TEAM

by Vicki Smith, Chairman

The State Contract Advisory Team (SCAT) was formed approximately two and one half years ago as a contract users group. Membership is open to State of Colorado employees interested in improving the State's contract processes and procedures. SCAT was formed to communicate with the Central Approvers Task Force (CATF) regarding State contracting policies and procedures; communicate issues and resolutions within the State's contracting community; provide and facilitate contract related training to its members; and improve the effectiveness and efficiency of State contracting. Monthly meetings are held on the second Tuesday of every month, except those months when CCIT meets.

Since the formation of SCAT, many improvements in contracting procedures and policies have been made. Regular communication has been established with the Central Approvers through the Chairman of SCAT attending monthly CATF meetings. Members of SCAT have facilitated discussions on a wide range of subjects including intellectual property, risk management, and indemnification. The members of SCAT have also been instrumental in the initiation and development of the revised contract manual. Additionally, SCAT members have undertaken a number of smaller projects, including Fiscal Rules changes and software piracy language.

Issues SCAT will be addressing this year include reviewing alternative contract routing to eliminate redundancies and reduce paperwork for contract execution. Additionally, a recommendation for expanded contract training programs will be made to DPA for their consideration.



A new Board of Directors for 2003 was elected at the January meeting. Vicki Smith with the Department of Labor & Employment will serve as Chairman; Robb MacTavish with the Department of Regulatory Agencies will serve as Vice Chairman; and Charlie Vanderlinden with the Department of Military Affairs will serve as Secretary.

SCAT continues to look for ways to improve State contracting processes and welcomes new ideas, suggestions, and members. If you are interested in receiving SCAT meeting notices, please contact Vicki Smith at (303) 318-8053 or vicki.smith@state.co.us.



AG Notes

By Robert Bowers, AGO

I have been requested by the Contract Manual Re-write Committee to draft a section describing the preferred way to refer to, identify, and mark state contract exhibits, attachments, and addenda. As you well know, once the manual is published and distributed, for good or bad, it quickly rises to the level of being almost holy. Certainly the manual is cited as if it were equal to any law passed by the legislature. With this background in mind, I think it is important to run the proposed naming convention by you for comment. Therefore, please review the following naming convention and e-mail me your thoughts. If you believe you have a better way of doing things, please let me know.

In an effort to bring some uniformity to the way exhibits, attachments, addenda, etc. are identified and marked in contracts and amendments, the following is proposed.

One should:

1. Identify all attachments, exhibits, appendices, etc. to the original contract as "**Exhibit** A, B, C, etc." In this regard, one must identify the document both in the body of the contract and on the first page thereof. When dealing with multiple exhibits, one should not vacillate in the description and alpha/numeric scheme used (i.e. if the first document is identified as an "Exhibit A," the next document should be "Exhibit B" not "Attachment 1" or some other similar designation).
2. If an exhibit contains an internal attachment, identify the attachment as "**Attachment** 1, 2, 3, etc. to **Exhibit** A, B, C, etc." In this manner, if the attachment becomes physically separated from the exhibit, it will be immediately apparent which exhibit the attachment belongs. In addition, the change in the description and alpha/numeric scheme helps identify this document as a nested attachment.
3. If it necessary to attach an exhibit to a contract modification document (i.e. an amendment), one must first determine whether the exhibit is intended to modify/supplement/replace an earlier version of the exhibit or is intended to be added to the contract's existing set of exhibits.

If an exhibit is meant to modify, supplement, or replace an earlier version of the exhibit, the new document should be identified using the same description and alpha/numeric scheme as the original exhibit with the addition of the following "As modified by Amendment ____." For example, to replace a contract's original Exhibit A with an updated version, the new exhibit should be marked "Exhibit A, as modified by Amendment 1"). Furthermore, the new exhibit should be drafted so as to completely replace the original exhibit thus removing any need to revisit the original exhibit. This, of course, may not be practicable when making a small change to a volumous exhibit, in which case, please use some discretion.

If, on the other hand, a new exhibit is not intended to modify, supplement, or replace an earlier exhibit, then it should be identified using the next available letter/number in the original contract's description and alpha/numeric scheme. For example, if the last exhibit identified in the original contract was Exhibit D, a new exhibit to be added by amendment should be identified as "Exhibit E."

IMPORTANT REMINDERS...

Future items of interest: The **Colorado Contract Manual** is being rewritten—specifically Chapter 6. A final version should be available the end of March.

State Controller Policies: The State Controller has updated all the policies related to State Contracting to include: Advance Payments, Federal Sub-Recipient Grants, State Contract Modifications, Contract Dating, Executing State Contracts with a Fiscal Year Value of \$50,000 or Less, Mixed Procurements, and Managing Commitment Vouchers that Violate State Statutes.

The policy updates will be forwarded via email within the next few days and also available on the SCO website.

TRAINING NOTE: Contract management and contract writing is available through the State's Training Academy. **All contract personnel** are highly encouraged to attend these classes. So... if you are new to the state system or you are in need of a refresher course, please sign up today. Classes are on-going and can be tailored to meet agency needs. For more information, please call Brad Mallon at 303.866.4265.

REAL ESTATE FORMS NOTE: Don't forget that the Lease Extension Agreement form formerly used to extend the term of a Lease Agreement for state tenants **is no longer being used**. As of July 1, 2002, agencies and institutions should be using the Amendment to Lease form for all lease amendments, including extension of the lease term. If you have any questions about this policy change, call Donna Barr, Real Estate Asset Manager



CCIT (Colorado Contract Improvement Team) Meeting

Wednesday, February 19, 2003

Camp George West – Golden, Colorado – Building 100

Agenda

9:00 — 9:05	Welcome	Phil Holtmann, SCO
9:05— 9:35	HIPPA Issues	Heidi Dineen, AGO HIPPA Coordinator
9:35— 10:15	Personal Services Update	Joi Simpson, DPA/HRS
10:15—10:25	SCAT Update	Vicki Smith, CDLE
10:25—10:35	B - - - R- - -E- - -A- - - K	
10:35—11:15	Legal Issues	Robert Bowers, AGO
11:15—12:00	State Controller Policies	Phil Holtmann, SCO

